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Editorial: Special Issue on Law and Governance in the Digital Era

Data Protection and Beyond

by **Magdalena Jozwiak**, **Lotte Anemaet** and **Jilles Hazenberg**

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A. Theme of the special issue

- 1 As noted by Lawrence Lessig in his seminal work *Code version 2.0*, the cyberspace is governed through a myriad of overlapping modalities: law, social norms, code, and market.¹ The contributions to this special issue explore different approaches to the governance of online content, and notably the flow of personal data and its engagement with these modalities.
- 2 Although the regulation of the digital domain remains a challenge, there is now a growing body of norms and institutions engaging with this task. In particular, in the European Union (EU) there is an ongoing trend of reinforcing the fundamental right to data protection, as guaranteed under Article 8 of the EU Charter. Such a trend is evidenced not only by the current reform of data protection law aimed at modernizing the EU regulatory framework but

also by the judicial activity in this field, confirmed in several recent judgments such as *Digital Rights Ireland*², *Google Spain*³ and *Schrems*.⁴ However, it seems that regulating the internet with legal norms is being constantly challenged by the inherent characteristics of the online world. The global scope, massive scale of content exchange and data collection, and the relative anonymity of internet users stand out. Moreover, legal norms cannot keep up with the speed of technological innovations. This constellation arguably further complicates effective governance of online content. Thus, in an attempt to safeguard the European standards of protection of the fundamental right to data protection online, it is worth exploring alternative modes of governance, such as standardization or promotion of certain social norms, and to look beyond traditional legal actors and mechanisms.

1 Lawrence Lessig, *Code version 2.0*, Basic Books, 2006.

2 *Digital Rights Ireland*, C-293/12.

3 *Google Spain*, C-131/12.

4 *Schrems*, C-362/14.

- 3 The articles included in this special issue deal with diverging, albeit related aspects of law and governance in the digital era. They range from the issues of data-protection and private regulatory bodies such as ICANN to the governance of hate speech and legal innovation. While all innovative in their own regard, taken together these articles offer a novel perspective on law and governance in the digital era. Not only are the diverse effects of increased digitalization and trans-boundary exchanges of information on regulatory instruments analyzed, innovative proposals are made towards transforming law and governance for the digital era. What the articles show is that there is not simply one solution to adapt law and governance to modern technologies. The perspective these articles offer moves beyond the grand narratives of the transforming nature of the digital era. They delve into the specific challenges encountered in practice and mitigate particular problems in specific areas of law and governance. Together therefore, a body of work is constituted that engages with problems on the ground concerning the challenges the digital era poses to fundamental rights and changing role of law.
- 6 The third paper by Natalie Alkiviadou points out that regulation of internet hate speech is dysfunctional, predominantly due to the vast divergence of US-European approaches to the issues of free expression both on and offline. The author argues that due to the very nature of the internet as a borderless and global entity, this normative divergence cannot be overcome so long as traditional approaches to the issue of regulation continue to be taken.
- 7 The fourth paper by Caroline Briceux shows that the process introduced by the Internet Corporation for Assigned Names and Numbers to assess and allocate new generic top-level domains (gTLDs) offers a vehicle for content regulation at two levels. First, regarding the gTLD itself, objection procedures were set to allow third parties to challenge an applied-for gTLD deemed to be contrary to “general principles of international law for morality and public order” or detrimental to broadly defined communities. The real concern of these objections managed by the International Chamber of Commerce was clearly not the gTLD itself but the potentially controversial content that might be published under it. Second, these preventive measures were coupled with a strengthened anti-abuse policy for new gTLDs. These provisions, if actually enforced by ICANN, could lead to content policing by private entities without any measure to ensure due consideration of freedom of expression for domain name holders.

B. Brief discussion of the papers

- 4 The first paper by Bernold Nieuwesteeg discusses the topic of data protection law from a methodological perspective. The research is the first ever systematic study that unlocks six paramount characteristics in the literal text of 71 Data Protection Laws (DPLs). This paper shows that only 5 out of 71 DPLs have penalties that deter companies from non-compliance. Furthermore, compared to the U.S. states, few countries have data breach notification laws. Additionally, the author develops a privacy index reflecting the robustness of the data protection laws analyzed. Countries that are not known for their stringent privacy controls, such as Mauritius and Mexico, cover a top position of this index. Member States of the EU have DPLs with a privacy control score above average but no absolute top position.
- 5 The second paper by María Rún Bjarnadottir on revenge porn argues that in the current legal regime victims of revenge porn are not being protected in line with state responsibilities due to jurisdictional challenges posed by the borderless nature of internet. The paper further shows that to efficiently handle crimes committed via the internet, considerable efforts have to be made to facilitate cooperation with social media networks and other online platforms to ensure effective investigations. It can be argued that human rights protection of individuals in European countries actually lies in the hands of US technology companies.
- 8 The final paper by Joshua Warburton on regulating digital content points out that the currently retracted Common European Sales Law needs to be reformulated to allow both legal development and mutual learning, whilst creating a parallel system that allows uniformity in cross-border digital transactions.

C. Relevance

- 9 Regulating the internet with legal norms raises several questions concerning the fundamental challenges facing this particular form of regulation. This special edition explores the new aspects of digitalization in the legal context, the way the law evolves to adapt to this changing reality, and illustrates how the digitalization affects new modes of governance. Additionally, the selection of papers looks into the alternative modes of shaping the digital reality in cases where the legal solutions turn out to be ineffective. As the JIPITEC journal aims to provide a forum for in-depth legal analysis of current issues of European intellectual property rights, E-Commerce, data protection and IT-security, this special edition on law and governance in the digital era written by authors from several European countries offers a balanced and novel perspective on

how changes stemming from increased digitalization are and could be dealt with in different legal terrains.

D. Selection of the papers

- 10 The papers comprising this special issue have been critically selected from participants in the international 3rd Annual Netherlands Institute for Law and Governance (NILG) PhD Roundtable Forum. The theme of this Forum was “Law and Governance in the Digital Era” and brought together PhD candidates from across the world working on issues related, but not limited to, law and governance approaches to issues emerging from all aspects of our current age of digitalization. The papers published in this special issue have gone through the regular double blind peer review process of JIPITEC.
- 11 The Netherlands Institute for Law and Governance is an inter-university research institute comprising the Groningen Centre for Law and Governance at the University of Groningen, the Kooijmans Institute for Law and Governance at the Free University Amsterdam, as well as the Universities of Wageningen and Twente.